IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 475 of 2000
with
CRIMINAL APPEAL No 476 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJU @ DILIP @ DENY NEPALI BHIMSINH PRAJAPATI

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal Nos. 475 of 2000 with 476 of 2000
MS NITA C BANKER Ld. Advocate as amicus curiae
MS BR GAJJAR APP for Respondent - State

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 06/05/2003

C.A.V. JUDGEMENT

1. As these two appeals arise out of the common judgment and order dated 27.04.00 rendered by the Addl. Sessions Judge, Surat, these two appeals are disposed of by this common judgment.

2. By the judgment and order dated 27.4.2000, the Addl.Sessions Judge, Surat sentenced the appellant of criminal appeal no. 475 of 2000 with rigorous imprisonment for seven years and fine of Rs.2,000/- in

default simple imprisonment for six months for the offence punishable under Sec. 394 & 394 read with 114 of Indian Penal Code and rigorous imprisonment for seven years and fine of Rs.2,000/- in default simple imprisonment for six months for the offence punishable under Sec. 397 of the Indian Penal Code. Both the sentences were ordered to run concurrently. The accused was given the benefit of set-off. By the same judgment and order, the appellant of criminal appeal no. 476 of 2000 was sentenced to rigorous imprisonment for seven years and fine of Rs.2,000/- in default simple imprisonment for six months for the offence under Sec. 394 & 394 read with 114 of the Indian Penal Code. This accused was also given the benefit of set-off. Dissatisfied with the said judgment and order, these two appeals are filed before this Court.

3. The brief facts are such that the complainant by name Lal Bahadur Rammuratsinh Thakur came to Surat on the call received by Loknathsinh who was also of his village and who invited the complainant for job at Surat. The complainant reached Surat at about 11.00 on 24.12.98 and then he had his dinner. After that he inquired from one person whether he can get a bus to Hazira and to that that person replied that he shall get the bus in the morning. The complainant slept in the bus stand platform no. 5. At about 2.00 a.m., he felt like someone taking away his blanket and on waking up he found three unknown persons. Out of the three persons one person showed knife and asked to take out the money. When the complainant said no, those persons hit him with knife and took out the money from his pocket forcefully and ran away with the money and the bag containing clothes. After that the complainant went to the police station and registered complaint on the basis of the police carried out the panchanama and recorded the statements of some of the businessmen who had shops in the bus stand. But nothing purposeful came in their statements as all the shops were closed at that time. After investigation, all the three accused were arrested and chargesheet was filed against them in the court of J.M.F.C., First Class Surat and one of the accused by name Pravin @ Bachkundo was minor and therefore a separate chargsheet was filed against him in the Juvenile court.

4. The case was committed to the Sessions Court, Surat and the Addl.Sessions, Judge Surat, after full fledged trial, convicted the two accused and sentenced them as stated above. Dissatisfied with the said judgment and order, these appeals are filed.

5. At the time of arguments, Ms.Nita Banker has stated that there is no identification parade and therefore it is difficult to know who were there along with the minor in looting the injured. It was time of 2.00 a.m. on 24.12.98 and a person who was in deep sleep and waking suddenly cannot see the faces of the alleged petitioners. In the last question of their statement under Sec.313 of the Criminal Procedure Code, both the petitioners denied their involvement in the alleged crime and submitted that as they were doing the labour work in the railway godown, they are falsely implicated in this crime. In her submissions, learned advocate for the petitioners has submitted that the panchas of panchanama turned hostile. No incriminating articles were found from the person of the petitioners-accused nor any article was seized. The blue bag of the complainant was not recovered from the person of either of the accused. The bag was found from one Mr.Sukhlal who has not been examined by the prosecution. The knives that are alleged to have been used in the alleged crime are found from the hut and not from the accused. The panchanama of the recovery of muddammal is not corroborating the case of the prosecution. The panchanama of the recovery of muddammal exh. 23 bears the signature of one Bhagwandas Shitaldas Gyani. This person has deposed at exh. 19 (page 68 of the paper book) that he is a doctor by profession and he has never gone for doing such panchanama. He was shown the panchanama to identify the signature to which he said that he has not signed it. Some person by his name might have signed it. He clearly states that he has never gone for such panchanama nor was he called by the police for such work. Another panch Maganbhai Bhikhabhai Nayka has deposed at exh. 30 that the police took his signatures on some papers which he identifies in court and except this, nothing is known to him. Therefore, runs the submissions of learned advocate for the petitioners, it is risky to believe on the depositions of such witnesses while convicting the accused. P.w. 9 Jabbar Mahmud Saiyed who is alleged to have identified the present petitioners after hitting the person carrying his bag also turned hostile and not supported the prosecution case. Lastly, it was submitted by the learned advocate for the petitioners that from the judgment and order, it appears that this if first offence of the accused and as the petitioners are of young age and other circumstances have come on record, this court should take lenient view and since both are in jail since 24.12.98 more than 4 1/2 years have passed and with remission and other benefits, it can be said that the petitioners have undergone sentence of more than 5 years. Therefore, this court should show mercy by allowing the

appeal and set aside the judgment and order and acquit the accused immediately. In support of his submissions, Ms.Nita Banker has relied on the judgment of this court in case of State of Gujarat V/s Hiteshkumar @ Hiten Gordhanbhai Patel reported in 2000(1) G.L.R. page 345.

6. Against the aforesaid submissions, Ms.Gajjar learned A.P.P.for the State has submitted that no identification parade is required to be held as injured complainant has rightly identified the present petitioners and third minor-accused who looted him with the money and bag full of clothes. Dr.Gaurang Somabhai Solanki examined the complainant at 2.20 a.m. on 24.12.98 who deposed at exh. 6 (page no.85 of the paper book). He was shown muddammal articles and he confirmed that such a injury can be caused by such articles. Therefore, there is a reason a believe that both the petitioners attacked with muddammal article no. 5 & 6 at the time of decoity. So far as the recovery of muddammal articles are concerned, in her submissions learned A.P.P. has submitted that the panchas might not supported the prosecution case, however, the fact remains that the complainant himself stated that he was attacked with muddammal articles no. 5 & 6 and looted the money and bag containing clothes. P.W.10 I.O.P.S.I. Arjun Tulsiram Borse has, during the investigation came to know about the present petitioners along with Pravin who was minor and he rightly carried out the investigation and at their instance recovered the muddammal knives and bag of clothes. For this purpose, the learned A.P.P. has read out before me the panchanama exh. 18 on page 65. The panchas and doctor are independent witnesses and therefore there is no reason to disbelieve their depositions. There are minor discrepancies that might come on the record of this case, however, in view of the binding decisions of this court as well as the Apex Court, such discrepancy can be taken lightly and in the larger interest of the society, the appeals are required to be dismissed.

7. I have perused the judgment and order of the learned trial court and also perused the authorities cited by the learned advocate for the petitioners. While going through the judgment, it appears that out of 11 witnesses, P.W. 5 Lal Bahadur Rammuratsinh Thakur, P.W. 6 Dr.Gaurang Somabhai Solanki, P.W. 10 Arjun Tulsiram Borse and P.W. 11 Bhupendra Jayantilal Kansara has supported the prosecution case whereas rest of the seven witnesses have not supported the prosecution case. Much emphasis is given by the learned advocate for the petitioners on the identification parade, however, I am

of the opinion that no identification parade is required in this case in view of the fact that there was sufficient time for the witness to identify all the three accused including the minor. The presence of the accused as well as the act of the loot is confirmed P.W. 10 Arjun Tulsiram Borse P.S.I. and further has stated that there is no fixed place for the residence of the present petitioners. They used to sleep at any place they like. On morning of the incident at 3.00 a.m. on 24.12.98, all the three accused came perspiring with one jeans bag and stated that they had looted one person. they have given blow to one person and looted him. He also gave the name of Manilal Shankar Rathod and Sukhlal Bhikhubhai Bhoy with whom the accused used to sleep and on raiding the said place both these persons were found and they have stated regarding the loot. They have also shown the jeans bag wherein there was one pant which was identified by the injured witness. Shri Sukhlal has further stated that one of the accused wore one jeans pant and shirt that was taken out from the bag. Both Rathod and Sukhlal were shown as witnesses, however, none of them could be traced at the time of recording the deposition inspite of the best efforts of the prosecution side to trace them.

8. So far as the panchas are concerned, none of them was supported the panchanams however,they had identified their signature except Dr. Gyani. It is important to note that on behalf of the complainant and the petitioners, their advocates have admitted the panchanamas a exh. 14,15 & 16 willingly and therefore though panchas have not supported the contents of the aforesaid panchanamas, in support of P.S.I.Borse before whom the panchanamas took place, it cannot be said that the panchanamas were merely exhibited and the contents of the panchanamas were wrong.

9. In case of Hiteshkumar @ Hiten Gordhanbhai Patel (supra), the Division Bench of this Court while considering the position that the statement of witness who testified having last seen the accused and deceased was recorded two months after the incident, identification parade was not held and in such a situation, witness identifying the accused in court after six years of the incident, held that major contradictions were there in testimony of other witnesses and upheld the acquittal. In the present case before me, all the three accused were arrested within a period of 10 days. Therefore, this authority will not help the present petitioners.

10. In view of the aforesaid circumstances, I am of

the opinion that the present petitioners were in company of the third minor accused whose trial is commenced/not commenced due to minority and have lootetd the injured witness on the day of the incident. Therefore, I am not inclined to interfere with the sentence which is passed against the present petitioners by the learned trial court. These appeals are therefore dismissed. The sentence and conviction passed by the learned Addl. Sessions Judge, Surat in Sessions Case No.152 of 1999 dated 27.04.2000, is confirmed.

(SHARAD D DAVE, J)

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